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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 769

THE CALIFORNIA COMPANY,
Petitioner,

versus

FRED KUCHENIG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

THE CALIFORNIA COMPANY (whose corporate name from December 31, 1960 until July 1, 1965 was "California Oil Company", upon which last date it was changed to "Chevron Oil Company") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above entitled case on July 12, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 61-66) is unreported and is printed in Appendix B hereto, *infra* pp. 38-42. The opinion of the Circuit Court of Appeals (R. 71-94), printed in Appendix B hereto, *infra* pp. 15-35, is reported in 350 F. 2d 551.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 12, 1965 (R. 95, Appendix B hereto, *infra* p. 36). A timely petition for rehearing, filed on July 30, 1965, (R. 96-120) was denied on October 22, 1965 (R. 122, Appendix B hereto, *infra* p. 37). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether in a petitory or title action, based upon diversity of citizenship, brought against a mineral lessee of the State of Louisiana by an adverse title claimant, to establish ownership and recover possession of navigable waterbottoms and to obtain an accounting for minerals produced, the State of Louisiana, as the lessor, is an indispensable party to the whole action, including the demand for accounting.

2. Whether a United States court of appeals, as an intermediate appellate court, has the power, under 28 U.S.C. Sec. 2106, to dispose of part of a case and to withhold another part, by reserving its decision and retaining jurisdiction of the issue of indispensability of parties to an incidental demand for accounting in a title action, while affirming dismissal of the main demand for adjudication of title because of the absence of such indispensable party.

STATUTES INVOLVED

The statutory provisions involved are (1) 28 U.S.C. Sec. 2072 and F.R.C.P. Rule 19; and (2) 28 U.S.C. Sec. 2106. They are printed in Appendix A, *infra*, pp. 13-14.

STATEMENT

This civil action was filed by Fred Kuchenig ("Kuchenig") against The California Company ("California") on January 9, 1963. The jurisdiction of the District Court

was based upon diversity of citizenship, the plaintiff being a citizen of Missouri and the defendant, a corporation incorporated under the laws of California, although erroneously described in the complaint as a Nevada corporation. Kuchenig prayed to be recognized as owner, entitled to the possession of certain navigable waterbottoms in Breton Sound, situated in Plaquemines Parish, Louisiana, and for an accounting from California for oil and gas produced therefrom. Kuchenig's claim of title to the area in dispute purports to be based upon mesne conveyances from the State of Louisiana. California is the mineral lessee of the State of Louisiana under State Lease No. 1960, granted by State Mineral Board (the State's leasing agency) covering property designated as Tract No. 4778. The exterior limits of that tract encompass the submerged area claimed by Kuchenig.

As the State's mineral lessee, California drilled four wells on Tract No. 4778—two productive, two "dry holes" —all in navigable waters. The State has received the royalties on all production from the producing wells.

Upon the filing of Kuchenig's suit, California moved, with supporting affidavits, under F.R.C.P. Rules 12(b), (2),(7), and 43(e), to dismiss because of the non-joinder of its lessor, the State of Louisiana, as an indispensable party, and for lack of jurisdiction (R. 8-25). Then, after Kuchenig took the deposition of the secretary of the State Mineral Board, who confirmed California's claim to be the State's lessee (R. 30-59), the motion to dismiss was heard upon affidavits submitted by both parties and the above deposition. The District Court sustained the motion to dismiss for failure to join an indispensable party. It deferred atcion on the issue of jurisdiction (R. 66), *infra* p. 42. Judgment was entered accordingly (R. 60-61).

On appeal, the Fifth Circuit Court of Appeals affirmed that part of the judgment of the District Court which dismissed plaintiff's main demand for adjudication or declaration of title because of his failure to join the State as an indispensable party. However, the court below, noting that during the pendency of the appeal, Kuchenig had filed another suit against California for damages and accounting with respect to the same tract described in his first suit, did not affirm the ruling of the District Court dismissing the incidental demand for an accounting, stating, instead, that it reserved judgment and retained jurisdiction "as to the prayer for an accounting, pending the outcome of *Kuchenig v. California*, E.D. La. 1964, 233 F. Supp. 389."

THE REASONS FOR GRANTING THE WRIT

I.

THE QUESTIONS INVOLVED ARE IMPORTANT.

1. The constantly recurring issue of indispensability of parties in diversity cases, involving divergent views of lower federal courts, and resulting in the decision below which conflicts with prior decisions of (a) the same court, (b) another court of appeals, and (c) a state appellate court, makes it important, if not imperative, for this Court now to decide whether federal or state law controls decision of that issue and whether the decision below erroneously failed to apply either rule.

2. The question as to the power of a federal appellate court to dispose of only part of a case on appeal and to retain a part so permeates the whole field of appellate jurisdiction or power as to call for inquiry into the correctness of the decision below reserving judgment and jurisdiction over plaintiff's incidental demand for accounting while dis-

missing for want of an indispensable party the main demand upon which the demand for accounting is based.

II.

THE DECISION AS TO INDISPENSABLE PARTIES CONFLICTS WITH PRIOR DECISIONS OF THE SAME COURT, OF A LOUISIANA APPELLATE COURT, AND OF ANOTHER COURT OF APPEALS.

As yet, this Court has not decided whether, in diversity cases, indispensability of absent parties is a question of procedure or substance. If procedural, it is a federal practice problem under 28 U.S.C. Sec. 2072, which may be or, appropriately, may become regulated by F.R.C.P. Rule 19. If substantive, *Erie R. Co. v. Tompkins* (1938), 304 U.S. 64, applies, with state law controlling the outcome of the issue.

The court below, in point I of its opinion, discussed the different points of view which had been expressed, saying that the cases are "widely discrepant" as to which law should apply. It seems clear that the court below, in points II and III of its opinion, dealing with Kuchenig's main demand for adjudication of title, decided the issue of parties primarily upon Louisiana law. Previously, the court below had considered it "settled" that indispensability of parties was a question of procedure governed by federal law. *Lawrence v. Sun Oil Co.* (1948), 166 F. 2d 466.

Yet, it is submitted that whether federal or state law applies, the decision below, reserving judgment and retaining jurisdiction against California as to the demand for accounting while dismissing Kuchenig's main demand for declaration of title because of the absence of California's lessor, the State, erroneously fails to follow either rule. If

state law controls, *Bolden v. Brazile* (La. App. 4th Cir., 1965), 172 So. 2d 304, dictated that this entire suit be dismissed under the "outcome determinative" rule of *Angel v. Bullington* (1947), 330 U.S. 183. *Six Companies of California v. Joint Highway District No. 13* (1940), 311 U.S. 180. On the contrary, if federal law controls, the decision below is contrary to the court's own prior decision in *Ward v. Humble Oil & Refining Co.*, (5th Cir., 1963), 321 F. 2d 775, where that entire suit was also dismissed. It is also in conflict with the decision of the Ninth Circuit Court of Appeals in *State of Washington v. United States* (1936), 87 F. 2d 421.

In the *Bolden* case, involving an adverse title action, with a demand for accounting for minerals produced, the dismissal of the action against the mineral lessors on the ground of abandonment was held by the Louisiana appellate court to require the dismissal of the entire action, which included the prayer for accounting against the lessee, the lessors being indispensable.

In the *Ward* case, the court below held the United States to be indispensable to a suit against the Secretary of Interior and the acting Director of the Bureau of Land Management to cancel, as a cloud on title, an oil and gas lease granted by the Bureau, and for an accounting for oil and gas produced, damages for wilful trespass, and other relief. Because the official defendants were immune from suit due to the sovereign immunity of the United States, the court below dismissed the entire suit against the non-official defendants who were holders of the federal lease.

In the *State of Washington* case, the Ninth Circuit Court of Appeals held that State, as the lessor, to be an indispensable party to a suit by the United States to enjoin lessees of the state from occupying property the ownership

and right to possession of which were claimed by the United States, even though the complaint contained no allegation showing any interest of the State in the disputed premises. The status of the defendants as lessees, occupying the property under color of the state lease, appeared only by the defensive pleadings.

Those cases honored the rule that persons are indispensable parties when they "not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience". *Shields v. Barrow* (U.S.) 17 How. (1855), 130, 139; Cf. *Lumbermen's Mut. Cas. Co. v. Elbert* (1954), 348 U.S. 48, 52. The court below was cognizant of the *Ward* and *State of Washington* cases, citing them in its opinion, but in a different context. It did not, however, discuss the conflict with those cases which its decision in the present case had brought about. Nor did it even mention the state ruling in the *Bolden* case. Instead, the court below pitched its reservation of decision as to the prayer for accounting upon (i) whether under Louisiana law a suit for accounting may be severed from the title demand and maintained as an independent action, saying in this regard, despite the above cited cases, that this issue had not been presented to it or to the district court, and (ii) the pendency in the District Court of the second *Kuchenig* suit.

It is submitted that said ruling is clearly erroneous. It disregards the fact that the identical issue of indispensability was involved in both the *Ward* and *Bolden* cases, and in each instance the entire suit was dismissed. It also overlooks the point that the State's indispensability as a lessor

cannot be measured solely by whether a demand for accounting is severable, to the exclusion of the other and more important criteria. *Shields v. Barrow, supra.* Those other elements, which are absent here, are that the court cannot render a final decree on an accounting against California, without affecting the State's interest, as lessor, and without leaving the controversy in such a condition that its final termination will be wholly inconsistent with equity and good conscience. *State of Washington v. United States, supra;* Cf. *California v. Southern Pacific Co.,* (1894), 157 U.S. 229, 249.

In this connection, in Louisiana, the prayer for accounting in a title action is said to be "a mere incident of the action of revendication". *Winter v. Zacharie* (1844), 6 Rob. 466, 468. In other words, the underlying issue is one of title, upon which depends the existence or not of any obligation to account. *Hayes v. Muller* (1963), 245 La. 356, 374, 158 So. 2d 191, 197. The action is locally described as a "mixed action"; it is not purely personal. La. C.C.P. Art. 422 (Appendix C, *infra* p. 42). As a matter of substance, we note that the State becomes the owner of its royalty share of the production at the moment the oil or gas is produced from the well. *Wall v. United Gas Public Service Co.,* (1934), 178 La. 908, 914, 152 So. 561, 563. Hence, any accounting suit against California as the State's lessee requires an accounting for the State's royalty share of the production as well as the lessee's share. Thus, any decision in such a suit would necessarily decide the ownership of the State's royalty share of the production "behind its back". *Louisiana v. Garfield* (1908), 211 U.S. 70, 77. Yet the State, not having been a party, may consider itself free to demand its lease royalties with the right to cancel California's lease in the event of non-payment. *Melancon v. Texas Co.,* (1956), 230 La. 593, 89 So. 2d 135. Cali-

fornia's exposure to the risk of double liability is, obviously inconsistent with equity and good conscience. Further, the incidental demand for accounting, if severed from the main issue of title, becomes a disturbance in law of California's possession as lessee. *Ingolia v. Pique*, 162 So. 2d 148 (La. App. 4th Cir., 1964), writ refused 246 La. 373, 164 So. 2d 360. Such a disturbance, based as it is upon a claim of right, is one which under Louisiana law a lessee may not defend without joining his lessor. La. C.C. Arts. 2692, 2703, 2704 (Appendix C, *infra* pp. 42-43).

The fact that an action for accounting against California would not be *res judicata* against the State does not make the State dispensable. *California v. Southern Pacific Co.*, *supra*, at p. 255; *Arizona v. California* (1936), 298 U.S. 558, 571; *Green v. Brophy* (C.A. Dist. Col., (1940)), 110 F. 2d 539, 541. Rather, the issue is more akin to substantive or procedural due process. This seems inherent in any determination of whether the decree in this case will, or will not, affect the interest of the State or leave the controversy herein in such condition that its final termination, in the absence of the State, will be wholly inconsistent with equity and good conscience. Certainly, the Ninth Circuit Court of Appeals did not regard severability of the lessor's interest from that of the lessee to be the sole or controlling factor of indispensability. *State of Washington v. United States*, *supra*. Nor, we submit, should it control that issue in this case where the court below recognized (Appendix B, *infra* p. 24), that this lessee also holds possession for its lessor, the State of Louisiana.

Further, it is submitted that the pendency now in the District Court of the second *Kuchenig* case—*Kuchenig v. California* (E.D. La., 1964), 233 F. Supp. 389—does not lend substance to, or eliminate the error from the reserva-

tion by the court below of its ruling on indispensability of parties in relation to the prayer for accounting. Under that court's own decisions in *Young v. Powell* (5th Cir., 1950), 179 F. 2d 147 and *Hilton v. Atlantic Refining Co.* (5th Cir., 1964), 327 F. 2d 217, and upon which it relied in its decision as to the main demand in the instant case, indispensability of parties is not even to be determined by the outcome of this case on its merits, let alone the outcome of another case which was not before the District Court or the court below and which forms no part of the record on appeal in this case. Cf. *Tyler v. Lowe* (2nd Cir., 1943), 138 F. 2d 867, 868. Consequently, the second *Kuchenig* case is neither relevant nor material to a decision as to who may be indispensable parties in the instant case. Patently, this partial reservation of judgment should not stand.

III.

THE RESERVATON OF JUDGMENT EXCEEDS THE APPELLATE POWER OF THE COURT BELOW.

The reservation of judgment and retention of jurisdiction by the court below as to the prayer for accounting, while affirming that part of the judgment of the District Court which dismissed Kuchenig's title demand, raised the issue as to the correctness of the assertion of power by a federal intermediate appellate court to decide or dispose of part of a case and to withhold its decision as to another part. This reservation by the court was promptly challenged in California's petition for rehearing.

The existence of United States courts of appeals, which are "inferior courts" within the meaning of Art. III, Section 1 of the Constitution of the United States, depends upon the Congress, which has the power but is not obligated to create such courts. *Glidden Co. v. Zdanok* (1962), 370

U.S. 530, 551. Such an intermediate appellate court "must look to the statute defining its appellate power, 28 U.S.C. Sec. 2106, for guidance as to the kind of order which it may direct the District Court to enter". *Bryan v. United States* (1950), 338 U.S. 552, 559. The pertinent statute, 28 U.S.C. Sec. 2106, provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." June 25, 1948, c. 646, 62 Stat. 963.

This statute does not, we submit, contemplate the appellate disposition of part of a case with the reservation of jurisdiction as to another part. Rather, it seems obvious from the terms of the statute that the power to "affirm, modify, vacate, set aside or reverse" a judgment which is on review and to "remand the cause", contemplates the disposition of the appellate phase of a controversy as an entirety, rather than on a "piecemeal" basis. The remaining stautory provisions deal simply with the authority of the appellate court to "direct" or "require" the lower court whose judgment is being reviewed to take the further appropriate steps to carry out the opinion and decree of the appellate court. *Bryan v. United States, supra.*

Indeed, the concept that a federal appellate court may dispose of part of the case and reserve decision on another part, retaining jurisdiction, is in obvious conflict with the rule that jurisdiction of the trial court ceases when an appeal is taken and again attaches when the appellate mandate is returned. *Hunter Douglas Corporation v. Lando*

Products (9th Cir., 1956), 235 F. 2d 631. This inconsistency is emphasized when Rule 32 of the rules of the Fifth Circuit Court of Appeals is considered. How the appellate court's mandate can re-vest jurisdiction in the District Court, in the face of the appellate court's declaration that it reserves judgment and retains jurisdiction of part of the case, cannot be explained. The appellate court's judgment here differs, we submit, from the ordinary appellate action which remands a case to a lower court for further activity there in order to better enable the appellate court to decide issues presented on the appeal. Such appellate practice is not under attack in this case. Here, the court below has put itself in the impossible posture of having to issue its mandate to the trial court to re-vest it with jurisdiction, while at the same time declining to exhaust its appellate jurisdiction by retaining without deciding a part of the case. This very inconsistency reveals the error in the court's ruling and its want of statutory power to retain jurisdiction of part of the case while deciding or disposing of another part, as the court below has attempted to do in this case.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 23, 1965.

APPENDIX A

1.

UNITED STATES CODE, TITLE 28, SECTION 2072:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158; July 7, 1958, Pub.L. 85-508, § 12(m), 72 Stat. 348."

FEDERAL CIVIL PROCEDURE, RULE 19:

"(a) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a

plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

"(b) *Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

"(c) *Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.* In any pleadings in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

2.

UNITED STATES CODE, TITLE 28, SECTION 2106:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20803

FRED KUCHENIG,

Appellant,

versus

THE CALIFORNIA COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(July 12, 1965.)

Before RIVES and WISDOM, Circuit Judges, and MORGAN, District Judge.

WISDOM, Circuit Judge: In this diversity action conflicting claims of the plaintiff and of the State of Louisiana to oil-rich water bottoms raise the question whether the State (a) in its capacity as the defendant's lessor and also (b) in its capacity as a sovereign State asserting title to allegedly inalienable beds of navigable waters is an indispensable party defendant.

The land in suit is in Plaquemines Parish, Louisiana. It is covered by the waters of Breton Sound, an arm of the Gulf of Mexico. The plaintiff, Fred Kuchenig, a resident of Missouri, is the adopted son and sole heir of his uncle, Martin Kuchenig. The plaintiff alleges that at one time the property was swamplands;[1] that the State patented the land in 1911 to one Millard C. Baker; and that, after several intermediate transfers, Martin Kuchenig bought the land in 1912. In 1915 Martin Kuchenig lost the land to the State for unpaid taxes. In 1961 Fred Kuchenig redeemed it.[2] Meanwhile, in 1951 the State, through its Mineral Board, executed Mineral Lease 1960, leasing Tract 4778 to the California Company. This tract encompasses the property lost to the State for unpaid taxes but later redeemed. The Company has drilled four oil wells on Tract 4778—two completed wells, two dry holes—all in navigable waters. The State has received royalties on all production from the two completed wells.

In 1961 Fred Kuchenig filed this petitory (title) action against California Company. In addition to asking the court to recognize his sole ownership of the property in dispute, the plaintiff demanded that California Company account for all oil and gas taken from the land. California Company, asserting possession under the mineral lease from the State of Louisiana, moved to dismiss on the ground that the State, an indispensable party, had not been joined.

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[1] Louisiana acquired ownership of navigable waters within its territorial limits by (a) the Swampland Grant Act, 9 Stat. 519 (1850), 43 U.S.C. 982, and (b) the original-title-in-the sovereign theory.

Under the Swampland Grant Act, swamp lands were given to the State of Louisiana without any restrictions as to the alienation of these lands. As such they are part of the private domain under Article 486 of the Louisiana Civil Code. See Comment, Diaz, Ownership of Bed of Navigable Waters, 30 Tul. L. Rev. 115, 118. See also Comment, the Public and Private Domains of the State, 12 Tul. L. Rev. 428 (1928).

[2] L.S.A.-R.S. 47:2224 provides that the owner of tax land adjudicated to the State, and his heirs, legatees, creditors, etc., may, on payment of the requisite interest and penalty, redeem the land "as long as the title thereto is in the state or in any of its political subdivisions".

The district court gave Kuchenig leave to join the State; when he failed to do so, the court dismissed the action for failure to join an indispensable party. Fed. R. Civ. P. 19. We affirm the dismissal of plaintiff's demand for a decree of ownership; we reserve judgment as to the accounting.

I.

A threshold problem is whether, in a diversity action, indispensability is a matter governed by state or federal law.

The Federal Rules of Civil Procedure offer no clear solution. In general, the Federal Rules dealing with joinder are not finely drawn. They derive from common law rules leavened by equity.[3] Rules 19 and 20, after a passing nod to the old common law standard, jointness of interest,[4] adopt by indirection the classification laid down by the Supreme Court in *Shields v. Barrow*, 1855, 17 How. 130, 147, 15 L. Ed. 158. There Justice Curtis described the "three classes of parties to a bill in equity": formal,[5] necessary, and indispensable.[6] Rule 19, dealing with "necessary joinder", refers to "persons who are not indispensable, but

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[3] Mallow v. Hinde, 1827, 12 Wheat. 194, 198, 6 L. Ed. 599; Young v. Powell, 5 Cir. 1950, 179 F. 2d 147 at 152; State of Washington v. United States, 9 Cir. 1936, 87 F. 2d 421 at 426; 2 Barron & Holtzoff, Federal Practice and Procedure § 511 (Wright ed. 1961); 6 Cyclopedia of Federal Procedure, 457, 543-52 (3rd ed. 1951); Hazard, Indispensable Party: The Historical Origin of a Procedural Phantom, 61 Col. L. Rev. 1254 (1961); Note, Developments in the Law: Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 879 (1958).

[4] See Fink, Indispensable Parties and the Proposed Amendment to Federal Rule 19, 74 Yale L. J. 403, 408-11 (1965).

[5] Formal parties are also referred to as "proper" parties. Barney v. Baltimore, 1867, 6 Wall. 280, 284, 18 L. Ed. 825. And some courts and commentators have referred to "formal" parties as being merely "nominal" parties, a subclassification of proper parties. See 2 Cyclopedia of Federal Procedure 382, n. 4 (3rd ed. 1951); 3 Moore, Federal Practice 2103 (2d ed. 1964).

[6] In Shields v. Barrow the Supreme Court laid down a definition of indispensable parties that has persisted in both state and federal courts:

> Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. 17 How. at 147.

who ought to be parties if complete relief is to be accorded between those already parties".[6a]

Rule 19 gives no content to the term "indispensable". The rule is said to be merely declaratory of existing law.[7] It is questionable, however, whether rule 19 is declaratory of federal law or of state law, or, indeed, of either.

In *Hanna v. Plumer*, 1965, 380 U.S. , 85 S. Ct. , 13 L. Ed. 2d , decided in April of this year, the Supreme Court discussed the relationship between the Federal Rules, the Rules Enabling Act,[8] and the Constitution. The Court distinguished between the line of cases classifying matters as substantive or procedural for the purpose of adjudicating the validity of various Federal Rules (*Sibbach v. Wilson & Co.*, 1940, 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479, and progeny) and the line of cases making that classi-

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[6a] "Rule 19. NECESSARY JOINDER OF PARTIES

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

[7] 3 Moore, Federal Practice 2144 (2d ed. 1964); Note, Indispensable Parties in the Federal Courts, 65 Harv. L. Rev. 1050, 1051.

[8] 28 U.S.C. § 2072 (1958 ed.).

fication under the rule in *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188,[9] none of which, said the Court, finally required a determination of the validity of a Federal Rule. The Court pointed out that Congress has the *power* to regulate "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either", 380 U.S. at , even where, in absence of an applicable Federal Rule or federal statute, *Erie R. Co. v. Tompkins* might require application of state law. A court instructed to apply a Federal Rule may "refuse to do so only if the Advisory Committee, [the Supreme] Court, and Congress erred in their prima facie judgment that the rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions. 380 U.S. at . The opinion does not undertake to say what, if any, difference there is between the "terms of the Enabling Act" and "constitutional restrictions"—that is, whether the Enabling Act exhausts the power of Congress to regulate practice and pleading in diversity suits. But in any event, the "uncertain area" that the Court mentions includes matters neither so clearly substantive that the Constitution requires that they be governed by state law, nor so clearly procedural that the Court may regulate them simply through its inherent rule-making power.[10]

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[9] Byrd v. Blue Ridge Cooperative, 1958, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 953; Bernhardt v. Polygraphic Co., 1956, 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199; Cohen v. Beneficial Loan Corp., 1949, 337 U.S. 541, 69 S. Ct. 1221, 93 L. ed. 1528; Woods v. Interstate Realty Co., 1949, 337 U.S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524; Ragan v. Merchants Transfer Co., 1949, 337 U.S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520; Guaranty Trust Co v. York, 1945, 326 U.S. 99, 65 S. Ct. 1464, 89 L Ed. 2079.

[10] The spectrum of matters potentially affected by the Federal Rules might be analyzed as follows: 1) Matters in which a federal court sitting in a diversity case is bound by the Constitution (reading article I and the tenth amendment together) to apply state law. 2) Matters that are beyond the scope of the Enabling Act, and in which the Rules of Decision Act, but not the Constitution, obliges federal courts in diversity actions to apply state law in absence of an applicable federal statute. (This category exists only if the Rules Enabling Act does not exhaust the power of Congress to regulate diversity litigation.) 3) Matters

(Continued)

Hanna v. Plumer introduces a helpful double abstraction—the *choice of choice* of *law*. The decision makes clear that the first inquiry for a diversity court seeking the proper source of the law governing indispensability—or any other matter potentially affected by the Federal Rules—is which of the Supreme Court's two lines of decision is pertinent. Do the Federal Rules "cover" indispensability? That is, does rule 19, by mentioning indispensability, incorporate by reference the entire body of federal indispensability precedent? The easy answer is, "No". In the first place, the text of the rule gives not the slightest clue as to the criteria that a federal court should apply in deciding who must, as opposed to who should or merely may, be joined. Second, no federal court faced with a conflict between a state indispensability rule and federal precedent has ever treated the question as one involving the validity of Rule 19. The cases, though many, are widely discrepant as to which law should apply.[11] But every court that has dealt with the issue at all seems to have treated it, appropriately in our view, as a run-of-the-mine Erie problem, requiring the usual balancing of substantive and procedural elements.[12]

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[10] (Continued)
within the scope of the Enabling Act, but that the Supreme Court has not chosen to regulate, and that are so substantive that in diversity actions they must, under the Rules of Decision Act, be governed by state law in absence of an applicable federal statute. 4) Matters within the scope of the Enabling Act, and that the Supreme Court has chosen to regulate, which are controlled by the Federal Rules. 5) Matters so procedural that they may be regulated by the Supreme Court and inferior federal courts even in absence of an applicable Federal Rule.

[11] See cases cited in 2 Barron & Holtzoff, Federal Practice and Procedure 92-3, nn. 15 and 16 (Wright ed. 1961); 3 Moore, Federal Practice 2153, n. 11 (2d ed. 1948); Wright, Federal Courts 260, nn. 28 and 29 (1963).

[12] See, for example, Resnik v. La Paz Guest Ranch, 9 Cir. 1961, 289 F. 2d 814, 819; Dunham v. Roberts, 10 Cir. 1952, 198 F. 2d 316, 319; Kroese v. General Steel Castings Corporation, 3 Cir. 1950, 179 F. 2d 760, 761 n. 1, cert. den'd. 339 U.S. 983, 70 S. Ct. 1026, 94 L. Ed. 1386; Richmond Lace Works, Inc. v. Epstein, S.D.N.Y. 1962, 31 F.R.D. 150, 152; Campbell v. Pacific Fruit Express Company, S.D. Idaho 1957, 148 F. Supp. 209, 211; Baker v. Dale, W.D. Mo. 1954, 123 F. Supp. 364, 367.

Unhappily, indispensability matters do not fall neatly into categories. Several factors urge application of federal law: Obviously joinder is, in a sense, always a matter of procedure, if that aging shibboleth still serves. And indispensability, while not properly regarded as a jurisdictional issue,[13] is closely related to jurisdiction,[14] and may act to defeat diversity jurisdiction. Moreover, "the concept of indispensability . . . was to a large extent self-imposed as a limitation upon federal equity jurisdiction, and there is a large body of federal indispensability precedent". Note, Developments in the Law, Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 888. Current theory, "which regards compulsory joinder as a discretionary matter, dependent on a realistic analysis of the facts of the case rather than as a matter governed by conceptual classifications of the interests of the parties",[15] lends further support to the view that federal, rather than state, law should govern.[16] 2 Barron & Holtzoff § 511 (Wright Ed. 1961).

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[13] Mallow v. Hinde, supra, at 198; Reed, Compulsory Joinder of Parties, 55 Mich. L. Rev. 327, 333; Advisory Committee's Note, Preliminary Draft of Proposed Amendments to Rules of Procedure for the United States District Courts, p. 87 (March 1964).

[14] Fink, Indispensable Parties and the Proposed Amendment to Federal Rule 19, 74 Yale L. J. 403, 412-22 (1965).

[15] 2 Barron & Holtzoff § 511 (Wright, ed. 1961).

[16] The preliminary draft of the proposed amendment to Rule 19, while laying down some guidelines for determining who must be joined, preserves to the court wide discretion in deciding whether to dismiss. Interestingly, the word "indispensable" does not appear in the proposed rule. The rule would create a new classification—"contingently necessary persons". If a contingently necessary person could not be joined, the court would decide "in equity and good conscience" whether the action should proceed or be dismissed. The new rule enumerates four factors to be considered by the court:

> first, to what extent a judgment rendered in the absence of the contingently necessary persons might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the absence of the contingently necessary person would be adequate; fourth, whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. Preliminary Draft of Proposed Amendments to Rules of Procedure for the United States District Courts, pp. 84-5.

An acute critical commentary on the proposed rule suggests that "it

(Continued)

On the other hand, rules of joinder depend on the substantive rights and liabilities of the parties, present and absent. In diversity actions, these substantive rights and liabilities are creatures of state law. Whenever a missing person cannot be joined, rules of indispensability are "outcome determinative", in the sense that they control whether the pending action must be dismissed. Disparities between federal and state indispensability rules, therefore, may affect primary private activity, and will necessarily encourage forum-shopping.[17]

Professor Wright characterizes the conflict in the cases as "more apparent than real": state law determines the interest of the parties; federal law determines whether these state-created interests render a missing person indispensable. Wright, Federal Courts 260 (1963). This short-hand formulation must at least be qualified insofar

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[16] (Continued)
is not far-fetched to predict that the proposed rule might be read as dealing only with what are presently called conditionally necessary parties, leaving the concept of indispensable parties alive, but unaccounted for in the Rules," pointing to the statement by Judge Aldrich in Stevens v. Loomis, 1 Cir. 1964, 334 F. 2d 775, 778, n. 7, that "The new rule omits all reference to indispensable parties, consistent with the view that what are indispensable parties is a matter of substance, not of procedure". Fink, Indispensable Parties and the Proposed Amendment to Federal Rule 19, 74 Yale L. J. 403, 425 (1965). Judge Aldrich gives the draftsmen the benefit of the doubt, but his reading is hard to reconcile with the statement by the Advisory Committee that the new rule does not use the word "indispensable" because that term "has suggested some iron rule of joinder based on categorization of rights, whereas a different approach is taken in the present subdivision". Advisory Committee's Note, Preliminary Draft of Proposed Amendments to Rule of Civil Procedure for the United States District Courts, p. 91 (March 1964).

[17] "Until we have an adequate theory of what the indispensable parties rule is, it is hardly possible to determine whether it is a rule of substantive law. It would seem that the indispensable parties rule is a rule of substantive law if failure to join an indispensable party goes to the court's "power to render a decree," is a "fatal error," or is, in itself, a violation of due process of law. On the other hand, if joinder requirements are merely means of adjudicating rights, and, within the confines of fairness which procedural due process always requires, are discretionary rules . . . then joinder requirements may be thought to be procedural for purposes of the Rule-Making Act, and therefore subject to change by amending the Federal Rules." Fink, Indispensable Parties and the Proposed Amendment to Federal Rule 19, 74 Yale L. J. 403, 431 (1965). If indispensability were regarded as beyond the reach of the Enabling Act, it would a fortiori be a matter of substance for *Erie* purposes.

as it leaves room for a federal court to run afoul of *Angel v. Bullington*, 1947, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832, by entertaining diversity actions unavailable under state law.[18] Professor Wright has recognized this caveat, suggested by Judge Wyzanski in *Stevens v. Loomis*, D.C. Mass. 1963, 223 F. Supp. 534, aff'd., 1 Cir. 1964, 334 F. 2d 775. "Judge Wyzanski carefully points out the limitation that if, as a matter of substantive law, a state does not recognize that a plaintiff has a particular right of action unless he joins with him certain others, then the federal court in a diversity action is precluded from giving a plaintiff who fails to join those others an opportunity to proceed as though alone he had a substantive right." 2 Barron & Holtzoff § 511 (1964 pocket part) (Wright ed. 1961). Even under Judge Wyzanski's view, however, the mere fact that state law labels a missing person "indispensable" may not always be controlling in federal court. If, for instance, a state indispensability rule were based purely on some administrative or procedural consideration, conceivably that rule might not conclude a federal diversity action. The nature and purpose of the state rule must be determined in each case.[19]

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[18] "Angel v. Bullington in its alternative ground followed the view of Guaranty Trust Co. v. York . . . that for purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State . . . .' * * * The York case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court. The contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that Erie R. Co. v. Tompkins was designed to eliminate." Woods v. Interstate Realty Company, supra n. 8.

[19] Where the missing person is indispensable under federal law but not under state law, Angel v. Bullington would not preclude dismissal by the federal court. And dismissal in such a case would, arguably, do no violence to state substantive rights, because the doors of the state courts would be open to the plaintiff. On the otherhand, *Erie* considerations aside, it is hard to see what advantage there could be in a federal court's refusing to entertain a diversity action available under state law, unless keeping the action would work some administrative hardship, or, perhaps, unless the state joinder rule were so fundamentally unfair as to impugn the integrity of the federal forum.

II.

Turning now to the indispensability of a lessor as a party defendant, we hold that Louisiana law requires dismissal of the plaintiff's demand for a declaration of ownership. Louisiana law styles the action brought by Kuchenig a "petitory" action.[20] Article 3651 of the Louisiana Code of Civil Procedure describes Kuchenig's complaint precisely:

> The petitory action is one brought by a person who claims the ownership, but who is not in possession of immovable property or a real right, against another who is in possession or claims the ownership thereof, adversely, to obtain judgment recognizing the plaintiff's ownership.

Comment (b) of the Official Revision Comments under article 3651 recites that the petitory action

> must be brought directly against the adverse claimant of ownership, or if there is no adverse claim, against the person in possession. There is no requirement that the action be brought against the tenant, since the latter does not possess for himself, but only for his lessor.

Where, as here, there is an adverse claim of ownership, the petitory action, as a substantive right, is not available against adverse claimant's lessee alone.[21]

The Louisiana Supreme Court has made clear its view that, although other relief may be had against a lessee, a claimant out of possession has no right to a decree of ownership in the absence of the adverse lessor. *Walmsley v. Pan American Petroleum Corporation*, 1963, 244 La. 513,

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[20] Yiannopoulos, Real Actions in Louisiana and Comparative Law, 25 La. L. Rev. 589, 599 (1965).

[21] "The action cannot be brought against the lessee alone, since, according to the substantive law, the lessee does not possess for himself but only for the lessor." Yiannopoulos, Real Actions in Louisiana and Comparative Law, 25 La. L. Rev. 589, 630 (1965).

153 So. 2d 375; *Daigle v. Pan American Production Company*, 1958, 236 La. 578, 108 So. 2d 516. Each of these cases, one decided before, the other after, the present Louisiana Code of Civil Procedure became effective in 1961, involved a suit by a claimant out of possession against a lessee under a state mineral lease and the State Mineral Board. In neither action was the State itself a party. The plaintiff in *Daigle* sought both a declaration of ownership and cancellation of the adverse state lease. The Louisiana Supreme Court, noting that the lease had expired and that a release had been executed, held that the suit was merely a petitory action and an action to establish title, and that it could not be maintained in absence of the State itself:

> The action to establish title to real estate (LSA-R.S. 13:5062) and the petitory action which plaintiff seeks to bring against the State Mineral Board, being concerned solely with the question of title to real rights claimed for the state, the state is a necessary party, and plaintiff is without legal right or cause to maintain them as against the State Mineral Board. And it follows that as a predicate to the filing of such a suit, the authorization of the state to be sued must be obtained. 108 So. 2d at 516.

The Court noted that an action against the State Mineral Board for cancellation of a mineral lease was "not an action against the State." 108 So. 2d at 519.

In *Walmsley*, however, the plaintiff, styling his action "one to remove a cloud from title or an action to quiet title", 153 So. 2d at 376, sought only cancellation of the state lease. The defendants filed an exception of nonjoinder of an indispensable party, alleging that the suit for cancellation of the lease would necessarily involve a determination of title, and that title to the leased property was in the State, not its mineral board. The State, defend-

ants argued, was an indispensable party under article 641 of the Louisiana Code of Civil Procedure.[22] The Supreme Court of Louisiana held that, because the plaintiffs sought merely cancellation of the lease, and not a declaration of ownership, the suit was not a petitory action, and the State was not indispensable. Before reaching that conclusion, however, the Court stated plainly the question before it:

> The issue presented is whether the State is an indispensable party. The State is an indispensable party if this is a petitory action as defendants contend. The State is not an indispensable party if this is an action to remove a cloud from title as plaintiffs contend. 153 So. 2d at 377.

Two justices dissented on the ground that the complaint described a petitory action, and that the State was therefore indispensable.

The present suit is exactly what the Louisiana Supreme Court determined that the action in *Walmsley* was *not*. The decision in *Walmsley* was based on the Court's holding that the plaintiff's suit did not "have as its object that plaintiffs be declared owners". 153 So. 2d at 379. Here Kuchenig asks for a judgment "decreeing plaintiff to be the owner" of the disputed property. We appreciate the plaintiff's dilemma: the missing, and indispensable, defendant may not be joined without its consent. But the law of Louisiana, which created this petitory action, dictates that it cannot proceed without, indeed that it "must be

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[22] Article 641 of the Louisiana Code of Civil Procedure provides:

Indispensable parties to an action are those whose interests in the subject matter are so interrelated, and would be so directly affected by the judgment, that a complete and equitable adjudication of the controversy cannot be made unless they are joined in the action.

No adjudication of an action can be made unless all indispensable parties are joined therein.

brought directly against", the State as lessor.[23] We cannot hold otherwise.[24]

III.

Kuchenig argues that, in spite of *Walmsley*, *Daigle*, and article 3651 of the Louisiana Code of Civil Procedure, the State is not indispensable. The asserted indispensability of the missing defendant rests on the State's long-standing claim to the beds of all navigable waters in Louisiana as the inalienable property of the State. Kuchenig takes the position (a) that the State's claim to the ownership of validly patented navigable water bottoms has been so severely buffeted by the Louisiana Supreme Court that it no longer amounts to a serious claim; and (b) that the State may in no event be considered indispensable to this suit, because the California Company's lease from the State does not include the property in issue. Paradoxically, Kuchenig's arguments require a decision on the merits—in advance of a trial on the merits.

A. The plaintiff's basic position is that the State cannot be considered an indispensable party because, even if the State were a party to the action, Act 62 of 1912 (LSA-

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[23] Though the question of whether a petitory action may proceed against an adverse lessee in absence of his lessor has always been regarded, by both federal and Louisiana state courts, as a matter of joinder, the language of Comment (b) under article 3651 of the Louisiana Code of Civil Procedure suggests that the defense of failure to state a claim upon which relief can be granted might also be appropriate where the lessor is omitted. Fed. R. Civ. P. 12(b).

[24] Choice of law here may not be crucial. The "large body of federal equity precedent", though characterized by no great consistency, urges dismissal. In spite of their broad discretionary power, federal courts applying federal law have, in general, taken at least as strict a view of compulsory joinder in actions involving real property and royalty payments as have the Louisiana courts. See, for example, Louisiana v. Garfield, 1908, 211 U.S. 70, 29 S. Ct. 31, 53 L. Ed. 92; Hilton v. Atlantic Refining Co., 5 Cir. 1964, 327 F. 2d 217; Ward v. Humble Oil & Refining Co., 5 Cir. 1963, 321 F. 2d 775; Lawrence v. Sun Oil Co., 5 Cir. 1948, 166 F. 2d 466; State of Washington v. United States, 9 Cir. 1936, 87 F. 2d 421; South Penn Co. v. Miller, 4 Cir. 1909, 175 F. 729; Amerada Petroleum Corp. v. Rio Oil Co., D.C. Wyo. 1964, 225 F. Supp. 907; Ward v. Louisiana Wild Life and Fisheries Commission, D.C. La. 1963, 224 F. Supp. 252.

R.S. 9:5661) would bar the State from asserting title to the disputed water bottoms. This statute provides that "actions, including those by the State of Louisiana", to annul a state patent prescribe six years from the date of the issuance of the patent. A number of relatively recent decisions of the Louisiana Supreme Court, relying on Act 62 of 1912, hold that after the expiration of the six year prescriptive period the State can no longer claim property patented to private land owners, even though the property may be under a navigable body of water of great commercial importance.[25]

The appellant's argument would be sound if the State of Louisiana asserted no claim to beds of navigable waters generally or to the particular land in dispute. This is manifestly not the case, since the State claims the beds of all navigable territorial waters and California Company is in possession under a lease from the State Mineral Board. The district court found: "[I]t now clearly appears from the record that the State of Louisiana, through its official leasing agency, State Mineral Board, does claim ownership of the area on which defendant's wells were drilled".

The thrust of the plaintiff's argument is that there is no "serious dispute" as to title. Undoubtedly, in the proper case, a defendant should not be allowed to impede the progress of litigation by bringing in a stranger with a frivolous claim to title. Here, however, the integrity and dignity of a sovereign State and the State's interest in several million acres of valuable navigable waters and water bottoms tend to blunt any charge that the claim inter-

[25] State v. Cenac, La. App. 1961, 132 So. 2d 897; cert. den'd with written reasons, 1961, 241 La. 1055, 132 So. 2d 928; California Company v. Price, 1954, 225 La. 706, 74 So. 2d 1; Humble Oil & Refining Co. v. State Mineral Board, 1953, 223 La. 47, 64 So. 2d 839; O'Brien v. State Mineral Board, 1945, 209 La. 266, 24 So. 2d 470; Realty Operators v. State Mineral Board, 1942, 202 La. 398, 12 So. 2d 198; State v. Sweet Lake Land & Oil Co., 1927, 164 La. 240, 113 So. 833.

posed is not serious. In these circumstances and at this stage of the litigation, the plaintiff totters under a back-breaking burden in attempting to persuade the Court to decide the main issue *now* by holding that the State has no serious claim to title.

The State cannot be brushed off so lightly. The State's claim rests on the codal principle[26] and public policy that navigable waters and their beds in Louisiana are "common things", owned by the State in its sovereign capacity and insusceptible of private ownership. A long line of early jurisprudence supports the State's position.[27] The Constitution of 1921 put the public policy on record—it did not create a new policy—in declaring: "Nor shall the Legislature alienate, or authorize the alienation of, the fee, of the bed of any navigable stream, lake or other body of water, except for purposes of reclamation." La. Const. of 1921, art. 4, § 2. And in 1954 the Louisiana legislature adopted a law stating that Act 62 of 1912 (contrary to the Louisiana Supreme Court's holding in *California Company v. Price*, 1954, 225 La. 706, 74 So. 2d 1) was not intended to cure patents to the beds of navigable waters. Act 727 of 1954, LSA-R.S. 9:1107-9. Act 727 provides that all patents "heretofore or hereafter" issued purporting to convey beds of navigable waters are null and void.

The plaintiff bases his contention on a series of recent four-three decisions of the Louisiana Supreme Court rejecting the State's claim to beds of navigable waters. In 1954, in *California Company v. Price*, 225 La. 706, 74 So. 2d 1,

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[26] La. Civ. Code, arts. 450, 451, 453, 482.

[27] Roy, Inc. v. Board of Commissioners, 1959, 237 La. 541, 111 So. 2d 765; Miami Corporation v. State, 1936, 186 La. 764, 173 So. 315; State v. Bayou Johnson Oyster Co., 1912, 130 La. 604, 58 So. 405; Burns v. Crescent Gun & Rod Club, 1906, 116 La. 1038, 41 So. 249; Zeller v. Southern Yacht Club, 1882, 34 La. Ann. 837; Milne v. Girodeau, 1838, 12 La. 324. See also Diaz, Ownership of Beds of Navigable Waters, 30 Tul. L. Rev. 115 (1955); Mayer, The Public and the Private Domains of the State, 12 Tul. L. Rev. 428, 430 (1938).

the Court, relying on Act 62 of 1912, confirmed a private title to over 4,000 acres of important water bottoms in Grand Bay, a navigable arm of the sea.[28] The decision affects the ownership of several million acres of other navigable water bottoms having a potential value to the State of hundreds of millions of dollars.[29] On rehearing, the Court held that bays and lakes are not "common things" under article 482 of the Civil Code but "public things", insusceptible of private ownership only if their dedication to public use is incompatible with private ownership. Accordingly, Act 62 of 1912 cured the patent in question, because at the time the patent was issued there were no statutory or constitutional provisions prohibiting the State from alienating beds of navigable waters.

Eleven days after the *Price* judgment became final, the Louisiana legislature adopted Act 727 of 1954. This statute, referred to earlier, was designed to overrule *Price;* it specifically repealed Act 62 of 1912 insofar as the two acts are in conflict. But so far, the State has been singularly unsuccessful in achieving the legislature's objective. In a second *Price* suit, *California Company v. Price*, 1957, 234 La. 338, 99 So. 2d 743, the State renewed its claim that beds of navigable waters are not susceptible of private

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[28] In an earlier decision, Sweet Lake Land & Oil Co., 1927, 164 La. 329, 113 So. 833, the Court held that Act 62 of 1912 barred the State from attacking a patent conveying the bed of a navigable lake. And in Humble Oil & Refining Co. v. State Mineral Board (the "Duck Lake" case), 1953, 223 La. 47, 64 So. 2d 839, the Court held that Act 62 of 1912 protected a transfer of the bed of a navigable lake held by a state agency, a levee board. But see Miami Corporation v. State, 1937, 186 La. 784, 173 So. 315, where the Supreme Court overruled State v. Erwin, 1931, 173 La. 507, 183 So. 84, primarily because *Erwin* had departed from the public policy of the State that declared the beds of navigable waters insusceptible of private ownership. In *Price*, on rehearing, the Court distinguished *Miami* on the ground that it dealt with erosion rather than with acquisition by a state patent; but "the rationale of *Miami*, that is, insusceptibility is completely inconsistent with the result in *Price*." Doyle, Ownership of Water Bottoms, 7 Tulane Tidelands Inst. 28, 43 (1963).

[29] Doyle, Ownership of the Beds and Bottoms of Navigable Waters in Louisiana, 7 Tulane Tidelands Inst. 28, 45 (1963).

ownership. Again by the narrowest of margins, the Louisiana Supreme Court rejected this contention. The Court held that on principles of res judicata and judicial estoppel the judgment in the earlier case was binding upon the Court. The Court ignored the Attorney General's plea that he be permitted to test the title in the light of the State's public policy as declared in Act 727 of 1954.

State v. Cenac, 1961, 241 La. 1055, 132 So. 2d 928 is the latest, perhaps not the last, word on the subject. *Cenac* involved a patent to river lots on Bayou Terrebonne, the rear boundaries of which are the shores of Lake Barre, a navigable lake. The State raised "issues . . . identical in every respect with those disposed of in the first [*Price* decision]." 132 So. 2d at 929. Chief Justice Fournet, who had dissented strongly in the *Price* cases, writing for the majority in *Cenac*, held that "stability of titles in this state" compelled the court to follow the *Price* ruling. Justice Summers concurred, expressing the view that the Act of 1954 could not change the meaning of the Act of 1912. Again three of the seven justices dissented, each writing a separate opinion. The dissents rest not only on the views expressed in the *Price* dissents but also on Act 727 of 1954, the State should not be denied the opportunity to argue the effect of that Act. "Thus, the present status of *Price* is that three of the justices feel it is correct, three that it is wrong, and one has expressed no opinion. However, there are now *four* justices that agree that *Price* is now either an unassailable rule of property or was good law originally. *Price* seems relatively secure, *at least for the moment.*"[30] We underscore the final clause of this conclusion, noting that the doctrine of stare decisis, in principle, is foreign to the civil law.

[30] Doyle. See note 7. Mr. Doyle was the attorney for Price in the litigation with California Company.

We express no opinion as to the validity of the State's claim. Nevertheless, we are impressed with the support to be found for the State's position in the Louisiana Constitution, the Civil Code,[31] and the early jurisprudence. We bear in mind too that Act 727 of 1954, although on the books at the time of *Cenac* and of the second *Price* decision, has never been tested as to its effect or constitutionality. In view of these considerations, we hold that the claim of the State of Louisiana to the title in dispute in this case is serious and cannot be decided without the presence of the State.

At this stage in the litigation, it is immaterial whether Kuchenig may prevail on the merits. In determining indispensability of parties, the relief asked, not the relief granted, is the controlling factor:

> "The slightest consideration will show that if appellee were right in the view he takes, that the relief granted, rather than that asked, determines indispensability, the whole doctrine and the equitable basis on which it rests would be gone by the board." *Young v. Powell*, 5 Cir. 1950, 179 F. 2d 147, 152.

This Court's recent decision in *Hilton v. Atlantic Refining Company*, 5 Cir. 1964, 327 F. 2d 217, reaffirms this rule. In that case, Texas residents sued to remove an oil and gas lease as a cloud on their title. The lessee, a Pennsylvania corporation, removed the case to the federal court. The plaintiff moved to remand, contending that certain Texas residents, as royalty owners, were indispensable parties. The trial court concluded that he would decide the case against the plaintiffs. On these grounds, he held that the royalty owners were not indispensable. This Court reversed, holding that

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[31] But see Doyle at 31-33, 45.

> " * * * the district judge could not, by determining in advance that he would decide the case adverse to plaintiffs' claim, made dispensable, parties who would otherwise be indispensable."

B. Second, Kuchenig argues that California Company has not shown that its lease from the State does in fact purport to cover the property at issue, because (1) the lease excepts from its coverage "tax lands owned by the State of Louisiana" and (2) the property described by the terms of the lease is impossible to locate. If California Company is not a lessee of the State, says Kuchenig, the State is not an indispensable party. The Company answers that the property can, in fact, be located, and that the term "tax lands" refers to *uplands* only. The district court found

> that the State of Louisiana, through its official leasing agency, State Mineral Board, does claim ownership of the area on which defendant's wells were drilled; that it intended to lease said area to defendant and now asserts that it did so. . . .

If there is a weak link in the chain connecting California Company and the disputed mineral rights, and we do not say or imply that it is weak, it is not the lease from the State; it is the State's title. But the validity of the State's title is an issue that may not be tried "behind its back". *Louisiana v. Garfield*, 1908, 211 U.S. 70, 29 S. Ct. 31, 53 L. Ed. 92.

IV.

It does not necessarily follow, however, that Kuchenig's prayer for an accounting stands or falls with his petitory action. Louisiana law is not clear as to whether a suit for an accounting may be maintained as an independent quasi-contractual action,[32] or whether it must always be merely incidental to some other theory. Here, if the prayer for an accounting is severable from the petitory action, the ques-

[32] La. Civil Code, Arts. 2293 and 2294.

tion arises whether the State is an indispensable party to the accounting. The district court did not consider these hard problems, nor have they been presented to us. We are reluctant to resolve them now, at the risk of doing violence to the law of Louisiana and putting undue strain on our own equitable muscles, especially where subsequent events may render such effort unnecessary.

We note that Kuchenig, pending appeal in this Court, *filed another complaint against the same defendant, in the same district court, concerning the same tract of land.* In this second complaint, however, he asked not a declaration of ownership *but damages for trespass and an accounting for all minerals wrongfully taken.* Under Louisiana law an owner not in possession has a cause of action in tort against a trespasser. *Harang v. Bowie Lumber Co.*, 1919, 145 La. 96, 81 So. 769. California Company moved to dismiss for failure to state a claim on which relief could be granted, and for failure to join the State Mineral Board as an indispensable party; it also sought a summary judgment on the ground that the trespass action had prescribed. The district court, in a written opinion, denied the defendant's motions, and allowed Kuchenig to amend his pleadings (1) to include an action to quiet title, and (2) to join the Mineral Board as a party defendant. (The court held the Board not immune from suit under the eleventh amendment.) *Kuchenig v. California Company*, E.D. La. 1964, 223 F. Supp. 389.

The accounting *asked for* in the second *Kuchenig* case is the same as that sought here. However, it may be that, because of prescription, some part of the damages sought in the first suit will not be recoverable in the second, filed several months later. The length of the prescriptive period in the second action will depend on how the accounting is characterized, and perhaps, on when Kuchenig

learned of the alleged trespass. These questions are now before the district court. If Kuchenig is successful in his second suit, and if the accounting there is identical with the one sought here, the question whether he may maintain the present action for an accounting independent of his petitory action, and without joining the State, will become moot. We reserve judgment, therefore, as to the accounting, retaining jurisdiction, until the termination of Kuchenig's second action.

We affirm that part of the judgment of the district court dismissing the plaintiff's prayer for a declaration of title; we reserve judgment as to the prayer for an accounting, pending the outcome of *Kuchenig v. California Company*, E.D. La. 1964, 233 F. Supp. 389.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1964

No. 20803

D. C. Docket No. 13033—Civil

FRED KUCHENIG,

Appellant,

versus

THE CALIFORNIA COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RIVES and WISDOM, Circuit Judges, and MORGAN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that that part of the judgment of the district court dismissing the plaintiff's prayer for a declaration of title in this cause be, and the same is hereby affirmed; we reserve judgment as to the prayer for an accounting, pending the outcome of *Kuchenig v. California Company*, E.D. La. 1964, 233 F. Supp. 389.

July 12, 1965

Issued as Mandate:

ORDER DENYING REHEARING

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20803

FRED KUCHENIG,

Appellant

versus

THE CALIFORNIA COMPANY,

Appellee

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING

(October 22, 1965)

Before RIVES and WISDOM, Circuit Judges, and MORGAN, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

OPINION OF THE DISTRICT COURT

(Caption omitted) Filed: JUN 5 1963

This case is before the Court on the defendant's motion to dismiss the action for failure to join an indispensable party and for lack of jurisdiction, and on the plaintiff's motion to strike part of the affidavit proof submitted in support of the defendant's motion to dismiss. For the reasons hereinafter set forth, the Court is of the opinion that defendant's motion to dismiss for want of an indispensable party is well founded and that plaintiff's motion to strike is now moot.

This is a Louisiana petitory or title action wherein the plaintiff seeks a judgment against the defendant, recognizing plaintiff to be the owner of the NE/4 of Section 36, Township 18 South, Range 17 East, Plaquemines Parish, Louisiana, it being alleged that defendant has drilled, completed and is operating a mineral well upon that property. The complaint further demands that plaintiff be decreed to be entitled to the sole and exclusive possession and includes an incidental demand for an accounting. Jurisdiction is based on diversity of citizenship and amount in controversy.

The defendant's motion to dismiss, which was supported by affidavit proof, is based upon its assertion that such possession as defendant has had in the area has been exercised exclusively under a mineral lease granted to defendant by the State of Louisiana as lessor, this lease being known as State Lease No. 1960, covering Tract 4778. Tract 4778, according to said state lease and the map referred to therein, consists almost, if not entirely, of water-covered areas in or near California Bay or Breton Sound. It further appears from the affidavit proof that defendant

has drilled four wells under the authority of State Lease No. 1960, two of which wells were producers; the remaining two being "dry holes: or non-productive. Royalty on all production from the two producing wells has been paid by defendant to the State of Louisiana. All four of the wells, according to the affidavit proof, were drilled in waters which are navigable, the depths ranging from 5.5 feet to 10 feet.

The plaintiff does not dispute the above facts, but contends that the property as described in his complaint was originally swamplands; that said lands were adjudicated to the State of Louisiana in 1915 for the non-payment of taxes, and were subsequently redeemed from tax sale in 1961, with the result that plaintiff contends that inasmuch as the description of the leased property as set out in State Lease 1960 only purports to include lands and waterbottoms owned by the State of Louisiana and also purports to "except tax lands" therefrom, the defendant's state lease does not include lands or waterbottoms owned by plaintiff and, hence, the state is not an indispensable party.

As for the plaintiff's motion to strike, it is directed at the affidavit (which defendant filed) of C. J. Bonnecarrere, Secretary of State Mineral Board, the statutory mineral leasing agency of the State of Louisiana. LSA-R.S. 30:121, et seq. In his affidavit, Mr. Bonnecarrere stated that the State of Louisiana claims title to the waterbottoms on which defendant's wells are located and drilled; that the State claims that defendant's wells were drilled under and by virtue of State Lease No. 1960, and that the State of Louisiana is collecting royalties on the production from the producing wells. The first two statements, the plaintiff contends, are conclusions of law and should be striken. However, after filing his motion to strike, plaintiff took

Mr. Bonnecarrere's deposition and offered the same in evidence at the second hearing on these motions; and from this deposition it clearly appears that Mr. Bonnecarrere has been secretary of Louisiana's State Mineral Board for many years and knows it to be a fact that it is the official position of State Mineral Board that lands under navigable waters are owned by the State of Louisiana and this position applies to such part of the property described in the complaint as is located within Tract 4778 covered by State Lease 1960; that Tract 4778, covered by said lease, consists of 880 acres of waterbottoms; that there is no public official authorized to disclaim title to said submerged lands in favor of any private individual. Further, Mr. Bonnecarrere's deposition shows that it is the official position of State Mineral Board that when tax lands are excluded from the description in a State mineral lease, such exclusion applies only to uplands—not to water-covered or submerged areas. He further testified that the State of Louisiana receives the royalties on production from defendant's producing wells. Deposition pp. 16-20, 23, 26-28, 31-34.

It is apparent, therefore, in view of the extensive deposition of Mr. Bonnecarre, that his testimony does not consist of mere legal conclusions, as plaintiff contends, but is as to facts concerning the official position of State Mineral Board within his personal knowledge. It further appears from Mr. Bonnecarrere's deposition that Louisiana's statutory leasing agency—State Mineral Board—does not agree with plaintiff's position that the area on which defendant's wells are located is not owned by the State and was not included in defendant's lease. Instead, it clearly appears that the State's position is exactly contrary to that of the plaintiff. In view of Mr. Bonnecarrere's deposition, the motion to strike parts of his affidavit may now be re-

garded as moot; and it now clearly appears from the record that the State of Louisiana, through its official leasing agency, State Mineral Board, does claim ownership of the area on which defendant's wells were drilled; that it intended to lease said area to defendant and now asserts that it did so, and this fact is further borne out by the fact that defendant pays and the State receives the royalties on production from the producing wells in question.

Under the circumstances, it appears clear that defendant's motion to dismiss this action for failure to join an indispensable party was properly filed under F.R.C.P. Rule 12(b) (7) and was properly heard upon the affidavits and deposition of Mr. C. J. Bonnecarrere under Rule 43(e). See also *Young v. Garrett*, 149 F. 2d 223 (8th Cir.); *McShane v. Sherrill*, 283 F. 2d 462 (9th Cir.); *Cyclopedia of Federal Procedure*, 3rd Ed. Vol. 5, § 15192, page 181.

These affidavits and Mr. Bonnecarrere's deposition show clearly that the controversy relates to an area the ownership of which is claimed by the State of Louisiana. And, since it is the relief asked for rather than that granted which controls the indispensability of parties, *Young v. Powell*, 179 F. 2d 147 (5th Cir.), it is the considered opinion of this Court that the plaintiff is not entitled to maintain this action against the State's lessee, without the State of Louisiana being before the Court as an indispensable party. *Lawrence v. Sun Oil Company*, 166 F. 2d 466 (5th Cir.). The fact that plaintiff's complaint does not mention the State of Louisiana or defendant's state lease is immaterial. The defendant having averred that such possession as it has had has been exercised exclusively under State Lease 1960, that is enough to make the State an indispensable party. *State of Washington v. United States*, 87 F. 2d 421 (9th Cir.). The State's title cannot be tried "behind

its back" and without affording it an opportunity to be heard. *Louisiana v. Garfield*, 211 U.S. 70, 53 L. Ed. 52.

For the foregoing reasons, let a judgment be entered herein dismissing this action for failure to join the State of Louisiana as an indispensable party unless, within a reasonable time, to be fixed by the Court, plaintiff effectively joins the State as a party. In the meantime, the Court will defer action on defendant's motion to dismiss for lack of jurisdiction.

New Orleans, Louisiana, May 21, 1963.

S/ Frank B. Ellis
JUDGE

APPENDIX C

LOUISIANA CODE OF CIVIL PROCEDURE, ART. 422:

"A personal action is one brought to enforce an obligation against the obligor, personally and independently of the property which he may own, claim, or possess.

"A real action is one brought to enforce rights in, to, or upon immovable property.

"A mixed action is one brought to enforce both rights in, to, or upon immovable property, and a related obligation against the owner, claimant, or possessor thereof."

LOUISIANA CIVIL CODE ARTS. 2092, 2703, 2704:

"Art. 2692. The lessor is bound from the very nature of the contract, and without any clause to that effect:

* * * * *

"3. To cause the lessee to be in a peaceable

possession of the thing during the continuance of the lease."

"Art. 2703. The lessor is not bound to guarantee the lessee against disturbances caused by persons not claiming any right to the premises; but in that case the lessee has a right of action for damages sustained against the person occasioning such disturbance."

"Art. 2704. If the persons by whom those acts of disturbance have been committed, pretend to have a right to the thing leased, or if the lessee is cited to appear before a court of justice to answer to the complaint of the person thus claiming the whole or a part of the thing leased, or claiming some servitude on the same, he shall call the lessor in warranty, and shall be dismissed from the suit if he wishes it, by naming the person under whose rights he possesses."

FIFTH CIRCUIT RULE 32:

"Date of Issuance: The mandate of the court shall issue after twenty-one (21) days from the date of decision unless the time is shortened or enlarged by order. A certified copy of the judgment, and a copy of the opinion of the court, if any, where a new trial or further proceedings are to be had in the lower court, shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. Unless otherwise ordered, if the petition is denied, the mandate shall issue after seven (7) days from entry of the order denying the petition.

"A mandate once issued will not be recalled except by the court and to prevent injustice. As amended May 31, 1963."

CERTIFICATE OF SERVICE

I, LAWRENCE K. BENSON, counsel for the petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1965, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, upon the respondent herein, by depositing same in a United States mail box, with first class postage prepaid, addressed to counsel of record for the respondent, at their respective post office addresses as follows:

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